87-2072

Supreme Court, U.S.
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Case Number: _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

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HOWARD YOUNG,

Petitioner,

vs.

GENERAL FOODS CORPORATION,

Respondent.

---

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

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## QUESTION PRESENTED

Where an employee suing under the Age Discrimination in Employment Act, 29 U.S.C. Section 623 et seq. presents a prima facie case of discrimination and the employer articulates a legitimate non-discriminatory reason for the discharge of the plaintiff, what evidentiary showing is sufficient for the plaintiff to defeat summary judgment in favor of the employer?

## CERTIFICATE OF INTERESTED PARTIES

I hereby certify that:

1. The judge below was the Honorable Howell W. Melton.

2. Plaintiff below, petitioner in this court, is Howard Young.

3. Counsel for plaintiff below, petitioner in this court, is John F. MacLennan, of Kattman, Eshelman & MacLennan, P.A.

4. Defendant below, respondent in this Court, is General Foods, Incorporated.

5. Counsel for defendant below, respondent in this court, is Patricia M. Sabalis, Esquire, General Foods Corporation.

6. Counsel for defendant below, respondent in this court, is William A. Bald, Esquire, of Dale and Bald, P.A.

Respectfully submitted,

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## CITES TO THE DISTRICT COURT AND COURT OF APPEALS

The opinion of the district court is unpublished. The opinion of the court of appeals is published at 840 F.2d 825 (11th Cir. 1988).

## STATEMENT OF GROUNDS ON WHICH JURISDICTION INVOKED

The final judgment by the District Court was entered on June 9, 1987. The decision of the Court of Appeals, Eleventh Circuit, affirming the District Court was entered on March 21, 1988.

Petitioner is authorized to seek review of this matter by Rule 17, Rules of the United States Supreme Court and 28 U.S.C Section 2101.

## STATUTES AND REGULATIONS INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. 623 et seq.

The text of the relevant statutory provisions is found in the appendix to this petition.

## STATEMENT OF THE CASE AND THE FACTS

This action was brought by plaintiff, Howard Young, ("Young") alleging that his termination from employment with defendant, General Foods Corporation, ("General Foods") on December 1, 1983 was in violation of the Age Discrimination in Employment Act, ("ADEA"). Suit was filed on August 26, 1986 in the Middle District of Florida, Jacksonville Division. General Foods' Motion for Summary Judgment was granted on June 9, 1987. Young filed his Notice of Appeal to the United States Court of Appeals, Eleventh Circuit on June 23, 1987. The Court of Appeals affirmed the District Court's summary judgment in favor of General Foods by order entered March 21, 1988.

At the time of his termination, Young was

replaced by John Curran, who was 26 years old at that time. He had worked for General Foods for over 23 years the last twenty (20) of which were in essentially the same sales representative position. Young's supervisor for over 18 years was Mr. Robert Bell. Mr. Bell was replaced as Young's supervisor by Mr. John Biltgen approximately 20 months prior to Young's termination.

Young's sales performance for fiscal year 1982 was the best in the region. Young's fiscal year 1983 figures showed his area growth was up 8.8% as opposed to a regional increase of 8.9%.

Biltgen deleted a commodity known as CRYSTAL LIGHT from Young's sales figures which lowered Young's

standings in relation to the other sales personnel. Young usually ranked in the middle among the other territorial sales managers who were his peers with General Foods.

In October of 1982, Young was complimented by General Foods National Sales Manager for his excellent distribution and shelving of General Foods products.

Biltgen referred to Young as "not proactive", "not aggressive". Biltgen stated that Young "moved in slow motion" and "did not have wherewithal" to perform his job. Biltgen also compared Young's age to that of Biltgen's father. Young stated by affidavit that he understood those comments to refer to his age because of the context in which they were spoken. Biltgen advised Young that Biltgen would

change his mind concerning Young's termination if Young would retire early the next year.

The Court of Appeals in its decision held that the trial court properly granted summary judgment in favor of General Foods because General Foods had articulated a legitimate non-discriminatory reason for discharging Young (poor job performance) and Young had failed to introduce sufficient evidence of pretext to defeat summary judgment.

## BASIS FOR FEDERAL JURISDICTION

Young's suit invoked federal jurisdiction pursuant to the Age Discrimination in Employment Act, 29 U.S.C. Section 623 et seq.

## ARGUMENT

THIS COURT SHOULD DETERMINE WHETHER IN AN ACTION CLAIMING AGE DISCRIMINATION SUMMARY JUDGMENT IS PROPERLY ENTERED FOR THE EMPLOYER WHERE CONFLICTING EVIDENCE IS PRESENTED AS TO WHETHER THE PURPORTED REASON FOR THE PLAINTIFF'S DISCHARGE WAS THE ACTUAL REASON.

As the Eleventh Circuit noted, in the instant action Young presented a prima facie case pursuant to McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) by showing that he was 59 years of age at the time of his termination, was discharged, and was replaced by someone less than 40 years of age. The Eleventh Circuit noted that since Young had held his position for some period of time, it would be inferred that his job performance was sufficiently

satisfactory to present a prima facie case, disagreeing with the District Court's determination that Young had failed to prove a prima facie case because of that element.

General Foods raised the issue of inadequate job performance as its purported legitimate non-discriminatory reason for discharging Young. As noted by this court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 96 L.Ed.2d 1554 (1981) once the employer has articulated such a reason, the burden shifts to the plaintiff to demonstrate the purported reason given is pretext for prohibited discrimination. This court in Burdine held that plaintiffs in a discrimination case may demonstrate pretext either directly by persuading the court that a

discriminatory reason more likely motivated the employer or indirectly by showing that the employer's profferred explanation is unworthy of credence. (101 S.Ct. at 1095)

This court in Burdine went on to observe that in certain cases the plaintiff may be able to demonstrate pretext simply by the evidence presented to show a prima facie case plus effective cross-examination of the employer's witnesses. Naturally, since summary judgment was entered against Young, he was deprived of the opportunity of cross-examining the employer's witnesses to demonstrate pretext.

Young respectfully submits that the summary judgment in this action was improperly granted since the jury, as the sole judge of credibility of

evidence, could have concluded that the "employer's profferred explanation is unworthy of credence".

Young submits that the proper role of summary judgment in an employment discrimination case was set forth by the Fifth Circuit in Thornbrough v. Columbus and Greenville Railroads, Co., 760 F.2d 633 (5th Cir. 1985). In that case, the Fifth Circuit noted how rare it was for a plaintiff in an age discrimination case to have direct evidence of discrimination. The Fifth Circuit then quoted this court's decision in Burdine with respect to the two methods by which an employee may demonstrate that the articulated reasons for discharge are pretextual. The Fifth Circuit went on to state

> "In general, summary judgment is an inappropriate

> tool for resolving claims of employment discrimination, which involve nebulous questions of motivation and intent. . . .
>
> Often motivation and intent can only be proved through circumstantial evidence; determinations regarding motivation and intent depend on complicated inferences from the evidence and are therefore peculiarly within the province of a fact finder. . . . Thus, if any facts are in dispute, summary judgment is generally inappropriate.

Young, as did the plaintiff in Thornbrough, questions the objective truth of the so-called legitimate reason for his termination, i.e. poor job performance. Young points to his long service with General Foods prior to Biltgen becoming his supervisor which included numerous raises and bonuses. Young further pointed to Biltgen's manipulation of the figures to reduce Young's standings among his peers. Young also testified that his

performance was generally near the middle of the pack, if not above, among his peers.

In a case previously decided by the Eleventh Circuit, remarkably similar to Young's, Rosenfield v. Wellington Leisure Products, Inc., 827 F.2d 1493 (11th Cir. 1987) the plaintiff was a salesman fired for alleged poor job performance. The Eleventh Circuit in reversing a judgment NOV for the defendant stated at page 1496:

> "Wellington sought to prove that Rosenfield was fired because his job performance was unsatisfactory. The company submitted evidence that division Vice President, Dave Paulin, was disappointed in plaintiff's product and merchandising knowledge and plaintiff had been duly criticized by Paulin during his annual evaluation. Plaintiff was further criticized by Gary Kilgos, plaintiff's former peer and new supervisor, having replaced Dave Paulin, who

had been promoted. Kilgos testified at trial that he had observed improper product and display designs by plaintiff. He also complained that Rosenfield had not timely completed a particular project. There was further evidence that a client had called Paulin and Kilgos to complain about Rosenfield's inattention to details and inaccuracies in information furnished by Rosenfield. On the evidence established that plaintiff made several errors in obtaining his quotes on manufacturor's present price quotations and listing of brand names and descriptions of products."

The plaintiff in Rosenfield presented evidence he was a good salesman based upon bonuses and praise from the national accounts manager. Rosenfield had been hired at 51 and fired at 53 his replacement was 36, facts less compelling than Young, who worked for General Foods for over 23 years, was 59 at the time of his discharge and was replaced by someone less than 30 years

of age.

The Eleventh Circuit stated:

> "A jury which believed this testimony might very well conclude that Wellington's description of an incompetent salesman was anything but accurate."

The court concluded that where credible evidence existed that the plaintiff was a satisfactory salesman, a jury verdict for the plaintiff would be upheld.

Other courts of appeal have properly held that the issue of pretext in ADEA cases is generally for the finder of fact. In Gilkerson v. Toastmaster, Inc., 770 F.2d 133 (8th Cir. 1985) the court held that the mere articulation of an alleged legitimate non-discriminatory reason does not entitle the defendant to a judgment NOV. All of the evidence in the case

may allow the jury to find in favor of the plaintiff.

In Reeves v. General Foods, Corp., 682 F.2d 515 (5th Cir. 1982) the court of appeals affirmed a jury verdict in favor of the plaintiff. The defendant had articulated a legitimate non-discriminatory reason but the court noted at page 524 that the jury could have disbelieved the evidence presented by the defendant that the plaintiff was an inadequate sales representative. The court, holding as the Eleventh Circuit had in Rosenfield, at page 523 noted that if there was sufficient evidence for a jury to conclude that the plaintiff was not a poor performer then the issue of pretext was for the jury.

In Stacey v. Allied Store Corp., 768 F.2d 402 (D.C. Cir. 1985), the court stated at page 408 that if the

defendant's witnesses were simply not believed by the jury, then the evidence on pretext would be sufficient to create a jury question and therefore a JNOV was not appropriate.

Young submits that the courts in Rosenfield and Thornbrough properly held that where the non-discriminatory reason advanced for discharge is poor job performance and the evidence is such that a jury could conclude that the plaintiff was not in fact a poor performer, then the issue of pretext is one to be determined by the jury and neither a JNOV nor summary judgment is appropriate.

This Court clearly held in Burdine that pretext may be shown either directly or indirectly. Where the profferred legitimate reason for

discharge is poor job performance, yet evidence of record is such that a jury could reasonably conclude the plaintiff was not a poor performer, then the issue must be resolved by a jury. The decision in Young's case granting summary judgment is thus incorrect as a matter of law. This Court should grant the petition for certiorari and consider the issue raised by the petitioner.

## CONCLUSION

The ruling of the court of appeals in this case violates this Court's decision in Burdine which held that pretext may be proven not only directly but indirectly by demonstrating that the employer's profferred explanation is not worthy of credence. Since the finder of fact is to make all judgments on credibility, and since the evidence of record in Young's case is

such that a reasonable jury could well conclude that Young was not a poor performer so as to justify discharge, the summary judgment was inappropriate.

Young's petition raises important and serious questions as to when summary judgment is appropriate in an employment discrimination action pursuant to the ADEA. This Court should therefore grant the petition and consider the issues raised by the petitioner on the merits.

**CERTIFICATE OF SERVICE**

I hereby certify that on this date I caused three copies of the foregoing Petition for Writ of Certiorari to be served on each counsel for respondent, by first-class mail, postage prepaid as follows:

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Dated this 17th day of June, 1988.

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Howard YOUNG, Plaintiff-Appellant,

v.

GENERAL FOODS CORPORATION,
Defendant-Appellee.

No. 87-3479.

United States Court of Appeals,
Eleventh Circuit.

March 21, 1988.

Employee brought age discrimination against employer. The United States District Court, Middle District of Florida, NO. 86-900-CIV J-12, Howell W. Melton, J., granted summary judgment for employer. Employee appealed. The court of Appeals, Tuttle, Senior Circuit Judge, held that: (1) comments that employee lacked wherewithal to perform job, moved in slow motion, and was not proactive or aggressive, did not constitute direct evidence of discrimination; (2) employee

failed to establish that employer's asserted reason for termination, poor job performance, was pretextual; and (3) employer's offer of retirement was not probative of discriminatory intent. Affirmed.

In cases brought under the Age Discrimination in Employment Act, plaintiff bears ultimate burden of proving that age was determinative factor in employer's decision to terminate employment. Age Discrimination in Employment Act of 1967, Sections 2-17 as amended, 29 U.S.C.A. Sections 621-634.

If employee establishes prima facie case of age discrimination by producing direct evidence of discriminatory intent, burden shifts to employer to prove that same employment decision would have been reached even

absent any discriminatory intent. Age Discrimination in Employment Act of 1967, Sections 2-17 as amended, 29 U.S.C.A. Sections 621-634.

If employee establishes prima facie case of age discrimination by proving that employee was member of protected group was discharged, was replaced with persons outside protected group, and was qualified to do job, burden shifts to employer to articulate legitimate, non-discriminatory rationale for discharge; if employer does so, burden shifts back to employee to prove that employer's asserted reason was pretextual. Age Discrimination in Employment Act of 1967, Sections 2-17 as amended, 29 U.S.C.A. Section 621-634.

Remarks that employee lacked wherewithal to perform job, moved in

slow motion, was not proactive or aggressive, and was approximately the same age as manager's father did not constitute direct evidence of age discrimination; rather remarks at most referred only to characteristics sometimes associated with increasing age and were not directly probative of intent to discriminate. Age Discrimination in Employment Act of 1967, Sections 2-17 as amended, 29 U.S.C.A. Section 621-634.

Employee, who had been employed as territory sales manager, failed to establish, in age discrimination action, that employer's asserted reason for termination, poor job performance, was pretextual; employee did not dispute evaluation figures critical of his budget figures, conscientiousness, and performance of administrative tasks, and

employee conceded that, after being requested to do so, he failed to submit any merchandising ideas or conduct any business review presentations. Age Discrimination in Employment Act of 1967, Sections 2-17 as amended, 29 U.S.C.A. Section 621-634.

Employer's offer of retirement was not probative of discriminatory intent, in age discrimination action; employer had decided to fire employee before offering him alternative choice of retirement. Age Discrimination in Employment Act of 1967, Sections 2-17 as amended, 29 U.S.C.A. Section 621-634.

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Appeal from the United States District Court for the Middle District of Florida.

Before HILL and JOHNSON, Circuit

Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

This case involves a complaint filed under the Age Discrimination in Employment Act of 1967, Sections 2-17 as amended, 29 U.S.C. Sections 621-634. The district court granted summary judgment to the employer, holding that the employee had failed to establish pretext, an element essential to his case. We affirm.

## I. STATEMENT OF FACTS

Howard Young began working for General Foods Corporation in 1960. Three years later, Young became a Military Sales Representative in the company's Military Sales Division, responsible for the area including Jacksonville, Florida. In 1981 Young and the other Military Sales

Representatives were "upgraded" to the position of Territory Sales Managers (TSMs). In November 1982, Young was placed on probation for poor work performance and on December 1, 1983 he was fired. Young was 59 years old at the time of termination. He was replaced by a man 26 years old.

During much of his tenure at General Foods, Young's supervisor was Robert Bell. Young received raises and bonuses during this period, although the bonuses were given in equal amounts to all TSMs in a region based on overall region, rather than individual territory, performance. However, Young's affidavit contains a performance appraisal written by Bell in 1981 that stated that Young had not met his budget for two quarters of the fiscal year, had

a "tendency to become lax at times," and had failed to complete specific assignments and satisfactorily perform administrative tasks associated with his job.

In April 1982, John Biltgen replaced Bell as the Area Regional Sales Manager for the southeast region. Between April and November 1982, Young and Biltgen had several disagreements. Among other things, the pair disagreed over the value of making formal sales presentations. Several times Biltgen asked Young to develop a plan of action in that area; however, Young continued to rely solely on his past relationships with commissary officials in order to make sales. Biltgen also continued Bell's practice of formulating written "contracts" with each TSM. The initial agreement between Biltgen and Young,

developed in April, identified goals in the areas of sales volume, business growth, personal development, and cost effectiveness. On October 28, 1982, Biltgen completed a six-month written evaluation of information showing that the sales volume growth and "budget accomplishment" in Young's area trailed that of the region average. Biltgen criticized Young's "[p]resentations of new ideas" and stated that Young was "not proactive in the presentations, following through or shelving of new items." A listing of new items to be distributed also indicated that Young had not met his distribution objectives, which resulted in some of Young's customers being the only ones in the region not to stock certain items. In the "business building" area, Biltgen

criticized Young's lack of account development, noting that Young had neither developed a strategy to improve business nor submitted any merchandising ideas. Finally, Biltgen wrote that Young was "not maximizing volumes because of [his] non-aggressive/non-proactive posture" and that Young was "not managing in an aggressive manner and his trust level ha[d] been severely damaged." Excepting some of the sales figures, Young did not dispute Biltgen's comments contained in the evaluation.

Consequently Biltgen placed Young on probation effective November 22, 1982. Under the probationary terms, Young would be subject to termination unless he showed "substantial progress" by March 1, 1983. In a May 1983 evaluation, Biltgen reviewed Young's status and concluded that, instead of

being terminated, Young would "remain on formal probation with employment being extended on a month-to-month basis." At this time the majority of Young's sales and budget figures continued to be below the average for the region, prompting Biltgen to opine in the evaluation that "[t]here is . . . the feeling . . . that [Young] was not being proactive enough in going belly to the bar with new items and following up accordingly." In Young's final evaluation of November 10, 1983, Biltgen wrote that some of Young's customers continued to be the only ones not stocking certain items, that Biltgen himself had been forced to make certain presentations that should have been completed by Young, and that Young had yet to present any ideas for building business. Biltgen also noted that

Young's damaged merchandise expenses were the highest in the region. Prior to the final evaluation Young's budget accomplishment and volume figures had improved vis-a-vis the region; however, the improved volume performance resulted almost exclusively from sales of CRYSTAL LIGHT beverage. Because Young's territory was the only one merchandising the beverage, Biltgen recomputed Young's volume figures without CRYSTAL LIGHT sales in order to obtain a more accurate picture of Young's performance relative to the other TSMs in the region. The recomputed figures placed Young last in the southeast.

Approximately two weeks before filing the final evaluation, Biltgen informed Young that Young would be terminated prior to December 31, 1983. On November 14, 1983, Biltgen drafted a

memorandum notifying Young of his termination, effective that date. On November 21-22, 1983, Biltgen met with Young and attempted to persuade Young to retire instead. When Young refused to do so, Biltgen again terminated him, effective December 1, 1983.

Subsequently, Young filed suit against General Foods, claiming that Biltgen's actions showed an intent to discriminate against Young because of age. Young pointed specifically to Biltgen's deletion from volume figures of Young's sales of CRYSTAL LIGHT, Biltgen's remarks that Young lacked the "wherewithal" to perform in his job, "moved in slow motion," and "was not proactive" and "not aggressive." Young also stated that Biltgen had made a remark comparing Young's age with that

of Biltgen's father. The district court granted summary judgment to General Foods, however, holding that Young had neither produced direct evidence of discrimination nor evidence of pretext undermining the employer's assertion that he was fired because of poor job performance. From that decision Young now appeals.

## II. DISCUSSION

Young contends that the district court erred not considering some of Biltgen's remarks to constitute direct evidence of discrimination. Young also argues that he established a prima facie case under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d. 668 (1973) and raised a genuine issue of material fact regarding whether General Foods' rationale for his termination was pretextual. General

Foods asserts that Young presented neither direct evidence of discrimination nor sufficient evidence of pretext to withstand a motion for summary judgment. We agree that Young presented insufficient evidence of age discriminations to require submission of the case to a jury and that summary judgment for General Foods, therefore, was appropriate.

A. Introduction

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be rendered if "there is no genuine issue as to any material fact and [if] the moving party is entitled to a judgment as a matter of law." According to the Supreme Court:

> "[T]he plain language of Rule 56(c) mandates the entry of

> summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."

Celotex Corp. v. Catrett, 477 U.S. 317, ---, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The Court also has noted that "there is no issue for trial unless

there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242 --, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986),(citations omitted); see Barnes v. Southwest Forest Indus., inc., 814 F.2d 607, 609 (11th Cir. 1987) (quoting standards for granting summary judgments and directed verdicts).

[1-3] In cases brought under the age Discrimination in Employment Act (ADEA), the plaintiff bears the ultimate burden of proving that age was a determinative factor in the employer's decision to terminate his employment. See Anderson v. Savage Laboratories, Inc., 675 F.2d 1221, 1224 (11th Cir. 1982). Initially,

a plaintiff must establish a prima facie case of age discrimination. One such way is to produce direct evidence of discriminatory intent. If a plaintiff produces direct evidence, the employer must then prove that the same employment decision would have been reached absent any discriminatory intent. See Buckley v. Hospital Corp. of America, 758 F.2d 1525, 1529-30 (11th Cir. 1985). Alternatively, a prima facie case may be shown by proving that the plaintiff (1) was a member of the protected group, (2) was discharged, (3) was replaced with a person outside the protected group, and (4) was qualified to do the job. See id. at 1520 (discussing the McDonnell Douglas test). If a plaintiff establishes a prima facie case under McDonnell Douglas, the employer must

articulate a legitimate, non-discriminatory rationale for the discharge. If the employer does so, the burden shifts back to the plaintiff to prove that the employer's asserted reason is pretextual. See Anderson, 675 F.2d at 1224.

This court has discussed many times the relationship between the McDonnell Douglas standard for proving age discrimination and the grant of summary judgment. See e.g., Mauter v. Hardy Corp., 825 F.2d 1554 (11th Cir. 1987); Grigsby v. Reynolds Metals Co., 821 F.2d 590 (11th Cir. 1987); Barnes, 814 F.2d at 608-610; Pace v. Southern Ry. Sys., 701 F.2d 1383b (11th Cir.), cert. denied, 464 U.S. 1018, 104 S.Ct. 549, 78 L.Ed.2d 724 (1983). In particular, the fact that a plaintiff has established a prima facie case does not in and of itself

foreclose the possibility of summary judgment being granted in favor of the employer. See Pace, 702 F.2d at 1391. With regard to establishing pretext:

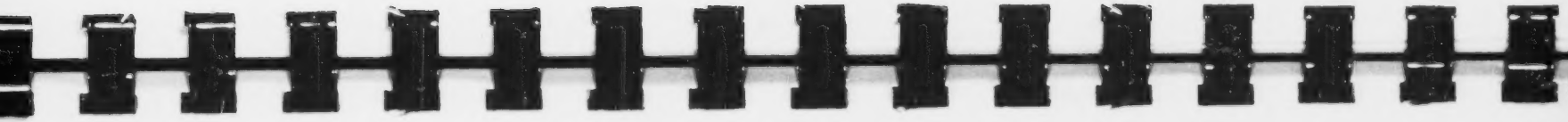
> A Plaintiff, when faced with a motion for summary judgment, . . . must respond sufficiently to any rebuttal by the defendant to create a genuine issue of material fact. Even where a prima face case has been established but the defendant has rebutted with a proffer of legitimate, non discriminatory reasons for the discharge, a genuine issue of material fact is not automatically presented . . . [O]nce a prima facie case creates a rebuttable presumption

> of discrimination; but this presumption alone does not create an inference that a material fact, sufficient to present a jury question, is in issue.

Id.; see also Halsell v. Kimberly Clark Corp, 683 F.2d 285, 291 (8th Cir. 1982), cert. denied, 459 U.S. 1205, 103 S.Ct. 1194, 75 L.Ed.2d 438 (1983). Because the plaintiff bears the burden of establishing pretext, he must present "significantly probative" evidence on the issue to avoid summary judgment. See Celotex 477 U.S. at ---, 106 S.Ct. at 2511.

B. Direct Evidence

[4] Before proceeding to our discussion of pretext, we confront initially Young's claim that he produced direct evidence of discrimination.



According to Young, Biltgen's oral and written comments that Young lacked the "wherewithal" to perform his job, "moved in slow motion," and was "not proactive," "not aggressive," and approximately the same age as Biltgen's father all constitute direct evidence of discrimination. We do not agree.

It is clear that not every comment concerning a person's age presents direct evidence of discrimination. See, e.g., Barnes, 814 F.2d at 610-11 (statement that plaintiff would have to take another physical examination "and at your age, I don't believe you could pass it," while "inappropriate and condescending," was not direct evidence of discrimination); see also Mauter, 825 F.2d at 1558; Chappell v. GTE PRoducts Corp., 803 F.2d

261, 268 n. 2 (6th Cir. 1986), cert. denied, --- U.S. ---, 107 S.Ct. 1375, 94 L.Ed.2d 690 (1987). Here, the majority of Biltgen's comments do not even directly concern Young's age. Rather the remarks in the evaluation that Young lacked the wherewithal to adequately perform his jog, moved in slow motion, and was neither aggressive nor "proactive," at most referred only to characteristics sometimes associated with increasing age. As this court has stated, "Congress made plain that the age statute was not meant to prohibit employment decisions based on factors that sometimes accompany advancing age, such as declining health or diminished vigor and competence." Barnes, 814 F.2d at 611 (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979)) (emphasis added).

Equally as important, the remarks are not directly probative of an intent to discriminate. This is not a case where Biltgen told Young that he would be fired because he was too old. See Castle v. Sangamo Weston, INc., 837 F.2d 1550, 1558 n. 13 (11th Cir. 1988) (discussing "direct" evidence of discrimination). Instead, it is a case where the plaintiff has inferred that certain factually neutral comments referred to his age in a discriminatory fashion. However, in evaluating any salesman's performance, statements regarding individual's aggressiveness, enthusiasm, and vigor are hardly surprising. In addition, a statement merely comparing someone's age with that of another is insufficient to constitute direct evidence of discrimination.

There was not evidence addressed that Biltgen thought of his father as being old. In fact, as Young readily admitted, the reason he believed the comment referred negatively to his age was because his own children thought of him as old. Based on this record, we conclude that the district court properly rejected Young's claim that he produced direct evidence of discrimination by Biltgen. The probative value of Biltgen's statements simply is too attenuated to be of legal significance in this case.

C. Pretext

[5] Assuming arguendo that Young established a prima facie case under McDonnell Douglas, the burden then shifted to General Foods to articulate a legitimate, non-discriminatory reason

for Young's discharge. In rebuttal, the company produced overwhelming evidence that Young was terminated because of poor job performance. Young admits that his supervisors, beginning with Bell, formulated written objectives ("contracts") for the TSMs and discussed them with the TSMs in advance. Young also does not dispute Bell's 1981 evaluation comments critical of Young's budget figures, conscientiousness, and performance of administrative tasks. Biltgen several times asked Young to develop a new sales plan. Rather than doing so, however, Young continued to rely on past relationships for the most part in making sales. As a result, some of Young's customers were the only ones in the region not stocking certain products. In addition, Young concedes that, after being requested to do so, he

failed to submit any merchandising ideas or conduct any business review presentations, forcing Biltgen to perform those tasks himself. Young's damaged merchandise expenses also were the highest in the region. Finally, statistical information contained in the written evaluations repeatedly showed Young's sales and business volume to be below that of the region average. Although Young disputes the accuracy of some of the figures, the majority of the information remains uncontested.

In his attempt to produce "significantly probative" evidence of pretext, Young states in his affidavit that his sales figures were good and his work performance was satisfactory. Young also sates that his termination was due to age because he could not

"imagine what expectations he did not achieve except possibly being a man of age 25 to 30." In addition, Young claims that some of the sales figures are inaccurate and that Biltgen's recomputation of one set of volume figures, as well as his offer of retirement, evidence discriminatory intent. We do not believe this evidence to be sufficiently probative of pretext to withstand a motion for summary judgment.

"[C]onclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [an employer] has offered . . . extensive evidence of legitimate, non-discriminatory reasons for its actions." Grigsby, 821 F.2d at 597. Although Young contends that he performed the job

satisfactorily at all times and was a victim of discrimination, he does not contest most of the objective negative statistical information contained in the written evaluation. For the numbers he does dispute, Young provides no link between the purported inaccuracy and age discrimination. Significantly, in one case, although Young disputes the accuracy of the value used, he does not deny the "bottom line" information, that his volume contribution slipped during the covered time interval. In the other, Young admits that he does "not have the figures to prove [that Biltgen] was wrong." Although Young also has pointed to Biltgen's recomputation of certain figures in one written report, Young does not dispute that he was the only TSM in the region selling the new

CRYSTAL LIGHT beverage. It is certainly understandable that a manager might delete those sales figures when comparing Young's performance against others not fortunate (or unfortunate) enough to be test-merchandising a new product. In this situation, the fact that Young was treated differently is of little value in inferring pretext, because he was situated differently than the other TSM's irrespective of age.

[6] Finally, we believe that Biltgen's offer of retirement to Young is not probative of discriminatory intent in this case. Here there is no dispute that Biltgen decided to fire Young before offering him the alternative choice of retirement. If Young had been fired after having been requested to retire, the earlier retirement offer might in some cases

allow an inference that age was a determinative factor in the termination. See, e.g., J.C. Penney Co., 803 F.2d 202, 205 (5th Cir. 1986). However, once the decision to fire Young had been made, Biltgen's offer, rather than suggesting pretext, tends to show a desire to provide Young with an opportunity to avoid the stigma associated with having been fired.

In sum, this is much like the case in Grigsby, 821 F.2d at 597:

> This is not a situation where, as [the plaintiff] contends, the district court impermissibly weighed the parties' evidence instead of looking for the existence of a genuine issue of fact. Where the defendant's justification evidence completely overcomes

> any inference to be drawn from the evidence submitted by the plaintiff, the district court may properly acknowledge that fact and award summary judgment to the employer.

See also Mauter, 825 F.2d at 1558; Simmons v. McGuffey Nursing Home, Inc., 619 F.2d 369, 3371 (5th Cir. 1980.

The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

HOWARD YOUNG,

Plaintiff,

vs.

GENERAL FOODS CORPORATION,

Defendant.

Case No. 86-900-Civ-J-12

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**ORDER**

Plaintiff Howard Young was terminated from his position with defendant General Foods Corporation on December 1, 1983. At the time of his discharge, plaintiff was fifty-nine years of age and had been an employee of defendant for over twenty-three years. Plaintiff was replaced by an individual who was twenty-six at the time he assumed plaintiff's former job. Based on these facts, plaintiff brought an

action against defendant, pursuant to the Age Discrimination in Employment Act, 29 U.S.C Section 621, et seq. ("ADEA"). After the close of discovery, defendant moved for summary judgment, arguing alternatively that plaintiff had failed to establish all of the elements essential to his case and that the action was barred by the statute of limitations. The Court has carefully considered the arguments of defendant and those contained in plaintiff's response in opposition to the motion for summary judgment. Upon such consideration, the Court has concluded that summary judgment for defendant is warranted, based on plaintiff's failure to establish an essential element of his case. While the Court will fully articulate the reasons for its decision in the order which follows, this ruling

eliminates the need for the Court to address the statute of limitations question raised by defendant.

The law applicable to cases brought under the ADEA is quite well-settled. To begin with, a plaintiff in such a suit has the initial burden of establishing a prima facie case using the formula that has come to be known as the Price/McDonnell Douglas test. This four-part test requires plaintiff to show (1) that he was a member of the protected class; (2) that he was discharged; (3) that he was qualified for the job; and (4) that he was replaced by a person outside the protected age group. See, e.g., Pace v. Southern Railway System, 701 F.2d 1383 (11th Cir.), cert. denied. 464 U.S. 1018 (1983). Once plaintiff establishes

a prima facie case, the burden shifts to defendant to articulate a legitimate, non-discriminatory reason for plaintiff's discharge. See, e.g., Goldstein v. Manhatten Industries, Inc., 758 F.2d 1435 (11th Cir.), cert. denied, 106 S.Ct. 525 (1985). Assuming defendant comes forward with a legitimate explanation for plaintiff's discharge, the burden of proof then returns to plaintiff who must show that defendant's proffered explanation is merely a pretext for age discrimination. See, e.g., Horn v. Bibb County Commission, 713 F.2d 689 (11th Cir. 1983).

The law applicable to motions for summary judgment is also well-settled and indeed, recently has been clarified by the United States Supreme Court. In Celotex v. Catrett, 106 S.Ct.

2548, 2552-53 (1986), the Court noted that the entry of summary judgment was appropriate "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that part will bear the burden of proof at trial. This interpretation of Fed. R. Civ. P. 56(c) is logical because "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims . . . ." Id. at 2553. In Anderson v. Liberty Lobby, inc., 106 S.Ct. 2505 (1986), the Supreme Court further elaborated on its view of rule 56(c), equating the standard for summary judgments with that for directed verdicts. The Court noted

that "there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Id. at 2511 (citations omitted).

With all of the above-noted principles in mind, the Court now turns to defendant's argument that plaintiff has not come forward with sufficient evidence to withstand a motion for summary judgment. Defendant contends that, even assuming plaintiff can establish a prima facie case, defendant has effectively rebutted the inference of age discrimination by articulating a legitimate reason for plaintiff's discharge -- substandard job performance. This rebuttal, defendant argues,

requires plaintiff to come forward with some probative evidence showing that defendant's explanation for plaintiff's discharge is a pretext for discriminatory conduct. Under the case law cited above, the Court believes that defendant has correctly interpreted the onus plaintiff must bear at this juncture. A review of the evidence proffered by plaintiff is thus in order.

To begin with, plaintiff attempts to expose as pretextual defendant's complaints about his job performance by an affidavit in which plaintiff states that his sales figures were good and his work performance was satisfactory. See Plaintiff's Exhibit A. Plaintiff's affidavit also states his belief that his termination was due to age because he could not "imagine

what expectations [he] did not achieve except possible being a man of age 25 to 30." Id.

The Court does not accord much weight to these statements. The law is clear that plaintiff's subjective belief of discrimination, however genuine, cannot form the basis of judicial relief. See Simmons v. McGuffey Nursing Home, Inc., 619 F.2d 369, 371 (5th Cir. 1980). See also Elliot v. Group Medical & Surgical Service, 714 F.2d 556 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1984); Ackerman v. Diamond Shamrock Corp., 670 F.2d 66 (6th Cir. 1970). Furthermore, the facts of record simply do not support plaintiff's contention that the substandard evaluations he received resulted from the discriminatory motives of his supervisor, Mr. John Biltgen. In an evaluation written by

plaintiff's past supervisor, Mr. R. L. Bell, plaintiff's "tendency to become lax at times" was commented upon, as was his failure to exceed budget projections for two of the fiscal year's for quarters. See Plaintiff's Exhibit B. The Court would also note that plaintiff's unfavorable evaluations from Mr. Biltgen were in large part based on objective, statistical figures. Finally, plaintiff admits that he disagreed with Mr. Biltgen's approach to making sales calls, plaintiff's deposition at 117, and did not change his selling methodology in most cases, id. at 173, in spite of the fact that Mr. Biltgen suggested he do so. Id. at 131, 135. In sum, aside from plaintiff's subjective statements, there is no evidence of record showing that plaintiff's job

performance was satisfactory during the period in which defendant states that it was substandard.

Next, plaintiff contends that certain statements made by Mr. Biltgen constitute direct evidence of discrimination. In his deposition, plaintiff noted that "Mr. Biltgen put in my many, many reviews that I worked in slow motion, that I was not proactive, something to the effect that I didn't have the wherewithal, which was a favorite word of his, and aggressive. I wasn't aggressive. And words to that effect." Id. at 99-100. Plaintiff also stated that while Mr. Biltgen never told him that he was an old man, Mr. Biltgen did compare him in age with Mr. Biltgen's father. Id. at 100-01.

Assuming for the purposes of this order that Mr. Biltgen made the

statements attributed to him by plaintiff, the Court does not believe that such statements constitute direct evidence of discrimination. In evaluating a salesman's performance, comments regarding the individual's aggressiveness, or lack thereof, are hardly surprising. And, as the Eleventh Circuit recently noted, "the age statute was not meant to prohibit employment decisions based on factors that sometimes accompany advancing age, such as declining health or diminished vigor and competence." (Emphasis added). Barnes v. Southwest Forest, Inc., 814 F.2d 607, 611 (11th Cir. 1987) (affirming summary judgment for defendant in an ADEA case; statement that plaintiff could not pass a physical exam at his age was "inappropriate and

condescending," but not direct evidence of discrimination".

It is apparent from the foregoing discussion that the record in this case is devoid of evidence tending to show that defendant's explanation for plaintiff's discharge is pretextual. Since plaintiff is thus unable to establish an element essential to his case, summary judgment for defendant is warranted.

Accordingly it is

ADJUDGED:

1. That defendant's motion for summary judgment is hereby granted; and

2. That the Clerk of the Court is hereby directed to enter judgment in favor of defendant and against plaintiff.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 9th day of

June 1987.

/s/Howell W. Melton
UNITED STATES DISTRICT JUDGE

## STATUTES

29 U.S.C Section 623(a).

Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer-

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of

any employee in order to comply with this chapter.